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by *Chin Kim**

I. INTRODUCTION

Until recently, Asian countries were of little immediate importance to the West. Since the Roman era, trade with "East Asia"[1] has played a significant role in the European economy.[2] However, only in the last few decades has the direct effect of Asian nations on the future of Western Civilization become clear to the West. In the aftermath of three wars, the American public has recognized the military power of the Asian countries. For example, in 1854, a sizable squadron of American warships was able to initiate the opening of Japanese ports against the will of Japanese rulers.[3] Ninety years later, only fully mobilized American might could force Japan to abandon its imperialistic aspirations. In the nineteenth century Western gunboats and troops easily could occupy any port in

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1. The term, "East Asia," which denotes the geographical location of the area, is preferable to "Far East," which implies the outdated notion that Europe is the center of the civilized world.

2. Borp, *Das indische Spinnhandrad und seine Wanderung nach Ost und West,* 3 CIBA-RUNDSCHAU 1096-1101 (1938); Hedin, *Rediscovering the Silk Road,* 1 DISCOVERY, N.S. 130-39 (1938); Sarasin, *Die Seidenstrassen von China nach dem romischen Kaiserreich,* 1 SINOLOGICA 96 (1948); Stein, *Central-Asian Relics of China's Ancient Silk Trade,* 20 T'OUNG PAO 130-41 (1921); Willetts, *The Silk Road,* 2 HIST. TODAY 746-52 (1952).

Chinese inventions have made significant contributions to European development. D. Lach, Contributions of China to German Civilization 1646-1740 (1941) (Univ. of Chicago thesis); G. DANTON, THE CULTURE CONTACTS OF THE UNITED STATES AND CHINA: THE EARLIEST SINO-AMERICAN CULTURE CONTACTS, 1784-1844 (1931); Shou-i Ch'en, The Influence of China on English Culture During the Eighteenth Century (1928) (Univ. of Chicago thesis).

3. For general background information about this event, *see* H. BORTON, JAPAN'S MODERN CENTURY — FROM PERRY TO 1970 (2d ed. 1970).

China, but in the 1950s, the Chinese were able to fight the best American ground forces to a bloody stalemate on the Korean peninsula. In 1858, the French army easily captured Tourane (Da Nang) but suffered a bitter defeat at Dien Bien Phu in 1954.[4] Subsequent U.S. involvement in the Vietnamese War demonstrated American inability to overcome tough North Vietnamese resilience. Americans realized the futility of applying purely military solutions to complex social and political problems.

Westerners also have observed that while the economies of Europe and the United States stumble, the economies of the Asia-Pacific region barely have broken stride in their pursuit of prosperity. As recession plagued much of the West in 1981, most non-communist Asian nations achieved growth rates of between three and seven percent.[5] In Hong Kong and Singapore, output increased by ten percent.[6] The Pacific economies contributed more to the increase in world production than the United States, Canada and Europe combined.[7] Due to its heavy export of automobiles, electronics and high-technology equipment, Japan enjoyed a trade surplus of $23 billion in 1981 as compared to just $2 billion in 1980.[8] Many economists predict that the non-communist Asian nations will experience similar production gains in 1982.[9]

The increasing military, political and economic power of Asia has revealed a disquieting fact to Americans: in planning its global strategies, the United States no longer can ignore the increasing importance of the nations in the Asia-Pacific region.[10] A new economic order, based on the principle of interdependency, is possible only by changing the largely unilateral role the United States has played in the region in the years immediately following World War II.[11] Recognizing this fact, the United States has moved toward international cooperation. A new era of U.S. accommodation with the People's Republic of China already has begun,[12] and the U.S. search for energy resources in Asia is in progress.[13]

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4. *See generally,* D. LANCASTER, THE EMANCIPATION OF FRENCH INDOCHINA (1961).
5. *Asia Takes the Fast Track,* TIME, Jan. 11, 1982, at 65.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* These economic gains are impressive because Asian nations are heavily dependent on foreign markets for their products. Despite the decreased demand for imports in the United States and Europe, many Asian nations have increased their exports. Economists predict that while the increase in Asian exports may abate somewhat, Asian economies will grow at an annual rate of about 6% until 1990. *Id.*
11. *The Pacific Community Idea: Hearings Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs,* 96th Cong., 1st Sess. 1 (1979); SENATE COMMITTEE ON FOREIGN RELATIONS, 96TH CONG. 1ST SESS., AN ASIAN-PACIFIC REGIONAL ECONOMIC ORGANIZATION: AN EXPLORATORY CONCEPT PAPER (Comm. Print 1979) (report authored by Profs. Hugh Patrick and John Drysdale on behalf of The Library of Congress, Congressional Research Service).
12. *Id.*
13. *Id.*

But before the West may begin to establish an effective new economic order, Westerners must recognize openly that the world society consists of diverse political and social systems, each an authentic expression of its own culture.[14] Once the West begins to understand and accept the merits of these other cultures, international discourse can help to alleviate some of the existing tensions and lead to new types of meaningful consensus in today's multicultural world.[15]

Westerners should recognize that Asian countries, with their diverse social and political institutions, tend to place less emphasis on the importance of law in society than do western nations. Although these culturally diverse regions have integrated some aspects of western law into their systems, they have not assimilated the western legal culture.[16] For instance, the concept of supremacy of law is not prevalent in all Asian societies.

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14. Bodenheimer notes that the term "culture" "is widely understood as a term with axiological overtones and value-impregnated connotations." Bodenheimer, Book Review, 25 AM. J. COMP. L. 416, 419-20 (1977) (reviewing H. W. EHRMANN, COMPARATIVE LEGAL CULTURES (1976)). Kleinjans discusses the concept of culture in the following way:

> Culture is that entire system of patterned behavior, beliefs, values, speech, and general design for living that is learned and shared by members of a given society. . . . Not only is cultural behavior a pattern and a part of a whole, but also the particular culture of any group is learned; it is not innate. . . . Within the normal range of individual differences, people's anatomical, physiological, and neurological capacities are the same; culture makes them different.

Kleinjans, *Reunifying the Koreas — Two Countries, Two Cultures,* 1 EAST-WEST PERSPECTIVES 32 (1979).

15. A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD 161-186 (1971) [hereinafter cited as BOZEMAN].

16. *Id.* at 34-160. See also Bozeman, *Law, Culture, and Foreign Policy: East Versus West,* 1 ASIAN AFFAIRS: AN AMERICAN VIEW 106 (1973); WAYS OF THINKING OF EASTERN PEOPLES: INDIA, CHINA, TIBET, JAPAN (Nakamura ed. 1964).

Comparativists are showing an increasing tendency to treat China, Japan, Korea, and Vietnam as a separate subject area for the purpose of comparative legal studies. *See* K. ZWEIGERT & H. KÖTZ, EINFUHRUNG IN DIE RECHTSVERGLEICHUNG AUF DEM GEBIFTE DES PRIVATRECHTS, BAND I: GRUNDLAGEN 419-34 (1971) [hereinafter cited as Zweigert & Kötz]; Noda, *The Far Eastern Conception of Law,* in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 120 (1971) [hereinafter cited as Noda]; In order to put the question, what is Western law, into a proper perspective, the comparativist, Réne David, discusses characteristics of the legal systems of socialist countries and such legal traditions as Moslem, Hindu and East Asian. David, *Exit-t-il un Droit Occidental?,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 56 (1961) [hereinafter cited as David, *Droit Occidental*]. According to Réne David and John Brierly, the laws of the Far East, include those of continental Asian countries east of India (China, Outer Mongolia, Korea, Burma and the states of Indochina), as well as Japan and Formosa. R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 440 (1968) [hereinafter cited as DAVID & BRIERLEY]. This definition leaves unclear whether Malaya or the Philippines is included. *See* A DIRECTORY OF PERSONS INTERESTED IN ASIAN LAW (C. Kim ed. 1975), which lists persons in the United States and non-Asian countries who have shown an active academic or professional interest in East Asian law. *See also* L. Beer, C. Dias, R. Edwards, R. Kidder, D. Lev & B. Metzger, *Asian Legal Studies in the United States: A Survey Report,* 29 J. LEG. ED. 501, 505-25 (1978).

David and Brierley group legal systems of various countries together into several categories based on cultural typology. Zweigert, *Zur Lehre von den Rechtskreisen,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW; LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 42 (1961). ZWEIGERT & KÖTZ, *supra* note

The differences between the legal principles of Asian and western nations is not explainable merely in terms of constitutions, statutes or court decisions, but one must also consider the different cultural contexts in which those legal principles function. For example, although the constitutions of Japan and the United States appear to provide many similar guarantees to their respective citizens, the courts of these nations apply the guarantees quite differently based on the different societal perceptions and goals.

One important step in promoting international understanding of the diverse political, legal and social attitudes of nations in Asia and the West is to offer a study in comparative law. This article proposes a curriculum and an approach for presenting a seminar in Asian law. A brief overview of a few suggested seminar sessions illustrates how an instructor might achieve the objectives of a comparative law study. The author proposes that the seminar consist of three components: perspective sessions, country sessions and problem sessions.[17]

In this article, the author discusses the perspective portion of the seminar dealing with the philosophies, history and usefulness of comparative law. The author then illustrates the country sessions component by focusing on the constitutional adjudication of cases in Japan and the United States. In this latter section, the author compares the Japanese and the U.S. Supreme Courts' approaches to the issues of justiciability, obscenity, the death penalty, the "right" to education, contested elections and freedom of religion. The author incorporated an expanded comparative analysis of the Japanese and U.S. Supreme Courts'

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15. David, *Introduction* to 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3-13 (1972); DAVID & BRIERLEY, *supra*. McAleavy, *Chinese Law*, in AN INTRODUCTION TO LEGAL SYSTEM 105-29 (J. Derrett ed. 1968) [hereinafter cited as McAleavy]. Schlesinger explores the similarities between various legal systems' approaches to the law of obligations, especially of contracts, that transcend the various *Kulturkreis* (cultural spheres). Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 65 (1961). John Merryman observes: "The law is rooted in the culture, and it responds, within cultural limits, to the specific demands of a given society in a given time and place. It is, at bottom, a historically determined process formulated, and resolved. Substitution of one legal tradition for another is neither possible nor desirable." J. MERRYMAN, THE CIVIL LAW TRADITION 157 (1969) [hereinafter cited as MERRYMAN].

17. In order to present and discuss the relevant material in reasonable depth, the seminar should consist of approximately fifteen two-hour sessions. In an Asian law seminar "perspective" sessions (sessions 1-2) should cover Asian law in perspective. "Country" sessions (sessions 3-7) should focus on the following topics: law in traditional China, law in contemporary Japan, the subsequent evolution and reception of Anglo-American law in contemporary Japan, a comparative analysis of constitutional adjudication in Japan and the United States and law in Korea and Vietnam. The remaining "Problem" sessions (sessions 8-15) should be devoted to discussing student research on the following topics: family law in contemporary Asian countries, the codification of conflict of law rules in Japan (1898) and its radiations in China, Korea and Thailand, labor law in Asia, trading with Asian countries, compensation for traffic victims in Asian countries, land reform, environmental planning, nationality law and population control in Asian countries, and the legal profession in Asian countries. The instructor, of course, may vary the emphasis given to the problem sessions due to the different interests of seminar participants. The author prepared this seminar schedule for the academic year 1977-78 at the University of Illinois College of Law.

treatment of these six constitutional issues into a comparative law course which the author taught at California Western School of Law during the academic year 1978-79.

II. GENERAL SEMINAR DESIGN

In outlining the seminar, the author has identified those principles of East Asian law which will best provide students with insight into the legal traditions of East Asia. The author, therefore, has focused the curriculum on three areas. First, the curriculum offers a survey of traditional Chinese legal culture[18] and its formal written expression in a series of dynastic imperial codes. Here, the curriculum presents a study of these codes' influence on the legal systems of Japan,[19] Korea[20] and Vietnam.[21] In presenting this area, the instructor should concentrate on an analysis of the social structures of the four countries, with particular reference to the mechanics and modalities of dispute resolution. Second, the curriculum includes an assessment of the impact of Franco-German and Anglo-American legal traditions on China, Japan, Korea and Vietnam throughout their modern histories. Finally, the curriculum imparts an understanding of the characteristics of the Chinese, Korean, and Vietnamese versions of socialist legality based on Marxism and Leninism.

III. PERSPECTIVE SESSIONS

The first two perspective sessions should be introductory and provide students with a background in the philosophies of comparative law. This background is necessary for meaningful participation in the seminar. Students will gain a perspective on the operation of their own legal system through an examination of legal concepts and techniques which are different from their own.[22]

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18. For a bibliographical guide to Chinese legal history, *see* E. Balazs & M. Engelborghs-Bertels, *China,* in BIBLIOGRAPHICAL INTRODUCTION TO LEGAL HISTORY AND ETHNOLOGY, § 14 (J. Gilissen ed. 1972).

19. For a useful guide and bibliography to Japanese legal history, *see* Ishii, *Japan,* in BIBLIOGRAPHICAL INTRODUCTION TO LEGAL HISTORY AND ETHNOLOGY, § 13 (J. Gilissen, ed. 1964).

20. Kim, *Korea,* in BIBLIOGRAPHICAL INTRODUCTION TO LEGAL HISTORY AND ETHNOLOGY, § 12 (J. Gilissen, ed. 1970).

21. Bongert, *Indochina,* in BIBLIOGRAPHICAL INTRODUCTION TO LEGAL HISTORY AND ETHNOLOGY, § 11 (J. Gilissen, ed. 1967). NGUYEN PHUONG-KHANH, VIETNAMESE LEGAL MATERIALS 1954-1975: A SELECTED ANNOTATED BIBLIOGRAPHY 54-56 (1977) (lists publications dealing with Vietnamese legal history).

22. While thrusting students into the consideration of legal issues within a foreign legal system may not be productive without preparing those students with respect to that country's legal and administrative institutions, judicial process and court structure, students can acquire an adequate background with the aid of a comprehensive outside reading list. The author prepared the following list in light of legal materials available in English as of May, 1980: J. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1928); S. VESSEY-FITZGERALD, THE FUTURE OF ORIENTAL LEGAL STUDIES (1948); J. ANDERSON, THE RELEVANCE OF ORIENTAL AND AFRICAN LEGAL STUDIES (1954); Noda, *supra* note 16. 1 K. ZWEIGERT

The perspective sessions should achieve two major objectives: they should discuss the meaning of "legal system" and introduce the philosophies behind the study of comparative law.

A. *Discussion of "Legal System"*

First, class discussion centers on the definition of "legal system." Students can be encouraged to offer their own definitions, as well as to comment on the definitions formulated by Wigmore[23] and other writers.[24] In conjunction with class discussion, the instructor might illustrate the shortcomings of Wigmore's historical jurisprudential approach in light of analytical, sociological jurisprudences and legal realism. The instructor should enable the participants to realize, however, that Wigmore's survey of different legal systems lacks an accurate description of how a legal system functions in a societal setting. In his analysis, Wigmore fails to discuss the interrelationship of law and culture.

B. *Lecture on Comparative Law*

In the next section of the course, the curriculum concentrates on enabling students to understand the East Asian legal system and its particular relationship to comparative law study. This portion of the course is primarily lecture-oriented, with a concentration on the definition of comparative law.

The curriculum first outlines the objective of comparative study, which is to impart an awareness that one nation's institutions, laws, and methods are not the only possible — or necessarily the best — in the world.[25] The lectures can be

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& H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 352-65 (1977); DAVID S. BRIERLEY, *supra* note 16, at 477-504. McAleavy, *supra* note 16. T'UNG-TSU CH'U, LAW AND SOCIETY IN TRADITIONAL CHINA (1965); V. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES (1978); NODA, INTRODUCTION TO JAPANESE LAW (1976); Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L & COMP. L. Q. 491 (1979); Kawashima, *The Status of the Individual in the Notion of Law, Right and Social Order*, in THE JAPANESE MIND ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE 262-87 (J. Moore ed. 1967); D. MITCHELL, AMAERU: THE EXPRESSION OF RECIPROCAL DEPENDENCY NEEDS IN JAPANESE POLITICS AND LAW (1976); Kim, *Legal Systems*, in STUDIES ON KOREA: A SCHOLAR'S GUIDE 338-57 (1980); M. HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA 1-2, 6, 40, 73-94, 186 (1978).

23. J. WIGMORE, A WORLD MAP OF PRESENT DAY LEGAL SYSTEMS at 1133-1146 [hereinafter cited as WIGMORE]. Of the sixteen systems discussed in Wigmore's work, only eight had survived by 1928 and, of the eight, Wigmore had considered only four to be pure systems at that time. Wigmore characterizes each of the various legal systems in three categories: pure, blended and composite. *Id.*

24. According to Wigmore, a legal system is a body of rules having a life of its own, as a part of some political system. Legal systems react upon themselves and tend to develop individual details. *See id.* at 1119-30. *See generally* Wortley, *On Re-reading Dean Wigmore's Panorama of the World's Legal Systems*, 2 PROBLEMES CONTEMPORAINS DE DROIT COMPARE 535 (1962) [hereinafter cited as Wortley]; Raz, *The Identity of Legal Systems*, 59 CALIF. L. REV. 795 (1971).

25. Comparative legal science teaches us how nations having a common origin may develop independently their original inheritance of legal ideas, and on the other hand how the legal systems of nations having no association in history may advance along common lines of

designed to give students critical insights into the role of law in society through an understanding of the different laws, policies and institutions that meet common problems in other countries.[26] In addition, students should consider the differences between the legal reasoning and arguments of foreign lawyers and those of American lawyers. Such consideration helps the student to understand that the study of comparative law may enable him to improve his own legal system because of insights gained into the mechanics of that system and because of the realization that replacing one approach to particular problems with superior foreign solutions may be possible.

The teaching of legal history and legal philosophy has added a new dimension to the traditional analysis of legal problems.[27] At present, with the law coming under constant pressure to adapt to rapid social and economic change, and with the underlying assumptions of the American system being challenged, a need for new and alternative solutions to social problems exists. Comparative law is a source of such solutions.[28]

The curriculum, therefore, devotes some attention to the manner in which various writers and philosophers have viewed the nature of comparative law as an approach to comparing legal systems and laws. For example, in discussing the meaning of "functional comparison," Pound explained that comparative study is concerned with determining how the same problem may be met by one legal institution or doctrine in one system of law and by a quite different institution or doctrine in another.[29]

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development. Investigations carried on in the region of a single system serve to smooth the path for the advent of comparative legal science.

J. WIGMORE, LAW AND JUSTICE IN TOKUGAWA JAPAN 7 (1969).

26. The instructor may wish to elaborate on the following statement:

> As the nations are drawn closer together by forces not wholly in human control, it is inevitable that they should come to know each other more fully. The legal institutions of any country are no less significant than its language, political ideas, and social organization. The two great legal systems of the world, the civil and common law, have for some years been moving toward what may become, in various fields of law, a common ground.

THE JURISPRUDENCE OF INTEREST: SELECTED WRITINGS OF MAX RUMELIN AND OTHERS at ix (M. Schoch trans. & ed. 1948).

27. Ault & Glendon, *The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparison* 27 J. LEG. ED. 599, 600 (1976).

28. *Id.*

29. R. Pound, *What May We Expect From Comparative Law?*, 22 A.B.A.J. 56, 60 (1936). Pound explains the meaning of "functional comparison":

> The functional approach in every connection is characteristic of the present day science of law. But when any term gets into vogue, there is danger of using it perfunctorily, with no critical attention to its meaning in a particular context. It will be inferred at once that I think of a comparison of legal precepts with respect to how and how far they attain their ends and the ends of law in the time and place. The workings of legal precepts are now looked into as much as or more than their abstract content. But what I have in mind particularly is study of how the same thing may be brought about, the same problem may be met by one legal institution or doctrine or precept in one body of law and by another and quite different institution or doctrine or precept in another.

Rheinstein, as well, described the "functional comparison of legal rules and institutions" as being conducted "for the purpose of better understanding the functions fulfilled by the rules and institutions of one's own law by looking at them through the mirror of corresponding foreign institutions."[30]

An instructor may wish to point out that René David[31] was a forerunner in advocating comparative law as a scientific approach to the study of legal systems. According to this view, the student of comparative law should acquire a knowledge of a country's political, social and economic structure in order to understand the sources of that nation's law and the function of its jurists.[32] The task of comparing domestic and foreign laws must proceed beyond the stage of examining mere written texts of law.[33]

David warns westerners against superimposing their convictions of the philosophical soundness of the western style of democracy, their methods of reason-

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Id. at 59. *See also* Pound, *The Revival of Comparative Law,* 5 TUL. L. REV. 1 (1930); Pound, *The Passing of Main-Streetism,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 7 (1961).

30. Rheinstein, *Teaching Comparative Law,* 5 U. CHI. L. REV. 615, 619 (1937-1938). The comparative method is useful for the study of what Rheinstein characterizes as the "sociology of law" for the purpose of determining the role played by law in human society in general. Comparative study also clarifies the methods which society has employed in various times and places for achieving desired ends of law. *Id.* According to Rheinstein, comparative law, employed in functional comparison, may be a tool for the practicing attorney by providing him with insights, ideas and arguments which he is unlikely to obtain by merely looking at the structure of his own law. *Id.* at 618.

31. David maintains that the observation of historical and sociological conditions of legal systems leads many to believe that comparative law is a method of veritable science. R. DAVID, TRAITÉ ELÉMÉNTAIRE DE DROIT CIVIL COMPARÉ 3-5 (1950) [hereinafter cited as DAVID, TRAITÉ ELÉMÉNTAIRE]; R. DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (DROIT COMPARÉ) 14-16 (3rd ed. 1969). *See also* David, *Existe-t-il un Droit Occidental?,* in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 56 (1961).

32. R. DAVID, TRAITÉ ELÉMÉNTAIRE *supra* note 31, at 3, 8, 9-10, 12, 17 (1950).

33. According to Harold Gutteridge, "the law must be examined in the light of their political, social or economic purpose, and regard must be paid to their dynamic rather than their static or doctrinal aspects." H. GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH 174 (2d ed. 1949). In Germany, one author has noted the existence of a gap between written law and law in actuality: "Section 239 of the German Code of Criminal Procedure, adopted in imitation of Anglo-American procedure, permits the lawyers for prosecution and defense to agree that they, rather than the presiding judge, shall examine the witnesses at trial. This provision has been dead letter from the moment of its enactment . . . ." J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 2 (1977).

Kahn-Freund stresses Gutteridge's point in more forceful words:

> [u]se [of the comparative method] requires a knowledge, not only of the foreign law, but also of its social, and above all, its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law. I am appealing to those who teach comparative law to be aware of this risk and to transmit that awareness to their students among whom there may be those called upon to promote the exchange of legal ideas in the processes of legislation.

Kahn-Freund, *Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1, 27 (1974). Law, according to the Gutteridge and Kahn-Freund thesis, is a socio-cultural phenomenon. Thus, a person examining foreign laws should obtain an informed perspective of the socio-politico economic motivations functioning in the countries concerned.

ing, and their moral and religious conceptions on the non-western nations of the world.[34] With this in mind, the instructor should emphasize that the study of comparative law is meaningful only when the student views legal systems as a function of the societal goals and attitudes that give law its effectiveness.[35]

IV. CONSTITUTIONAL ADJUDICATION OF CASES IN JAPAN AND THE UNITED STATES: A COMPARATIVE ANALYSIS

The following discussion of a comparative analysis of Japanese and U.S. constitutional adjudications illustrates how an instructor might achieve the above-mentioned objectives of the comparative law curriculum. The purpose of this seminar is to acquaint students with judicial analysis of the Japanese and U.S. Constitutions.[36] In order to properly analyze the selected Japanese Supreme

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34. David, *Deux Conceptions de l'Ordre Social,* in 1 IUS PRIVATUM GENTIUM 53 (1969).

35. The legal culture is the network of values and people's attitudes relating to law and practices. Such concepts as sociology of law or living law may be useful in clarifying elements of legal culture. The student should consider and question the cultural elements of a developed legal system. This should include:

> the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole. What kind of training and habits do lawyers and judges have? What do people think of law? Do groups or individuals willingly go to court? For what purposes do people turn to lawyers; for what purposes do they make use of other officials and intermediaries? Is there respect for law, government and tradition? What is the relationship between class structure and the use or non-use of legal institutions? What informal social controls exist in addition to or in place of formal ones? Who prefers which kind of controls, and why?

Friedman, *Legal Culture and Social Development,* 4 LAW & SOC'Y REV. 29, 34 (1969). Various factors such as beliefs and attitudes, condition the concept of legal culture and influence the way in which legal culture functions. Merryman uses the concept of legal tradition which he describes as:

> A set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression.

MERRYMAN, *supra* note 16, at 2.

Merryman observes that "legal culture" encompasses those "historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society," J. MERRYMAN & D. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 28 (1968). According to another commentator, legal culture means "the generalized set of lay and professional values and attitudes towards law and the role of the legal process in society. It is this complex of values and attitudes that largely determines which aspects of the formal legal structure work and which do not." K. KARST & R. RESENN, LAW AND DEVELOPMENT IN LATIN AMERICA 57-58 (1975).

36. English translations of 32 Japanese Supreme Court decisions are available for consultation in H. ITOH & L. BEER, CONSTITUTIONAL CASE LAW OF JAPAN (1978) [hereinafter cited as ITOH & BEER]. Many legal reforms in Japan followed the end of World War II. For a discussion of these reforms, *see* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY (A. von Mehren ed. 1963); A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN (1976). The adoption of the separation of powers doctrine was one of the most innovative reforms under the 1947 Constitution. This reform established the independent judiciary and abolished the old constitutional principle under which courts were subservient to the

Court decisions, students must have sufficient background insight into the organization and function of the judicial system in Japan. Students can acquire this background by reading several articles which address these issues.[37] After reading these assigned materials, students should then read several Japanese Supreme Court decisions[38] and compare them to American Supreme Court decisions on the same issue.

A. *Justiciability and Political Questions*

The concepts of justiciability and political questions present good subject matters for comparison, since these concepts are fundamental legal principles which the courts of both the United States and Japan have addressed. In order to facilitate a meaningful analysis, the instructor should ensure that students thoroughly understand these concepts before comparing the Japanese and American approaches to justiciability and political questions.

1. American Approach

Baker v. Carr[39] provides an important foundation for a discussion of justiciability in the comparative law context. In this well-known case, the U.S. Supreme Court held that a suit by voters to force reapportionment of the legislature did not involve a nonjusticiable political question. Justice Brennan's discussion of the political question doctrine clearly defined the American approach to justiciability of issues.

In writing the majority opinion, Justice Brennan stated that in determining whether a question falls within the political question category and is, therefore, nonjusticiable, "dominant consideration is given to the existence of satisfactory criteria for a judicial solution as well as to the appropriateness of attributing

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Emperor. H. ITOH, COMMENTARIES ON THE CONSTITUTION OF THE EMPIRE OF JAPAN 2-37, 110-123 (1906). Article 81 of the 1947 Constitution states: "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60 421 (1964) [hereinafter cited as MAKI] (this book offers selected translations of major Japanese Supreme Court cases and constitutional provisions).

37. Nathanson, *Constitutional Adjudication in Japan,* 7 AM. J. COMP. L. 195 (1958); Itoh, *Judicial Decision Making in the Japanese Supreme Court,* 3 LAW IN JAPAN: AN ANNUAL 128 (1969); Danelski, *The People and the Court in Japan,* in FRONTIERS OF JUDICIAL RESEARCH 45-72 (1969); Itoh, *How Judges Think in Japan,* 18 AM. J. COMP. L. 775 (1970). *See also* MAKI, *supra* note 36. THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67 (D. Henderson ed. 1969) [hereinafter cited as CONSTITUTION OF JAPAN].

38. The Supreme Court of Japan exercises broad powers of control in Japanese jurisprudence. It is not only the court of last resort with the power of constitutional review, but it also administers the entire judiciary. The Supreme Court is responsible for training all members of the legal profession and possesses the power to determine rules and trial procedures. MAKI, *supra* note 36, at XV.

39. 369 U.S. 186 (1962).

finality to the action of the political branches of the United States Government."[40]

According to Justice Brennan, the nonjusticiability of political questions is primarily a function of the separation of powers inherent in the U.S. system of government. Therefore, a case-by-case analysis is necessary.[41] The opinion emphasized that the determination of whether an issue has been committed by the Constitution to another branch of government, or whether the action of that branch exceeds its authority, is a "delicate exercise of constitutional interpretation and is a responsibility of [the Supreme Court] as ultimate interpretor of the Constitution."[42]

Justice Brennan also reviewed the justiciability of foreign relations issues, an area usually reserved for the executive or legislative branches of government:

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific cases, and of the possible consequences of judicial action.[43]

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40. *Id.* at 210. *See also,* Coleman v. Miller, 307 U.S. 433 (1938).

41. Baker v. Carr, 369 U.S. at 210.

42. *Id.* at 211.

43. *Id.* Other scholars doubt the existence of the "political question" doctrine. Some have suggested that the political question doctrine is simply another device by which the Supreme Court avoids issues it does not wish to decide. Scharp, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517 (1966). Professor Scharp analyzed the cases and concluded:

> The Court has available such a wide variety of procedural and substantive devices for not deciding, and it is in fact decided such a long list of explosive issues, that it appears rather unpersuasive to explain the political question doctrine purely in terms of an opportunistic retreat from "prickly" cases or issues.

Id. at 566.

Professor Henkin suggests that the separate political question doctrine does not exist.

> [T]here may be no doctrine requiring abstention from judicial review of 'political questions.' The cases which are supposed to have established the political question doctrine required no such extraordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain. Having reviewed, the Court refused to invalidate the challenged actions because they were within the constitutional authority of the President or Congress. In no case did the Court have to use the phrase 'political question' . . . .

Henkin, *Is There a 'Political Question' Doctrine?* 85 YALE L.J. 597, 600 (1976).

The opinion explained that a court will not ordinarily inquire into whether a treaty has been terminated because governmental action is of "controlling importance on such questions."[44] If, however, the government has taken no conclusive action, a court may construe a treaty and find that it provides the answer.[45] The opinion also noted that, although a court will not construe a treaty in a manner inconsistent with a subsequent federal statute, a court will not be so reluctant if the treaty conflicts with state law.[46]

Mora v. McNamara also offers important insight into the justiciability issue under U.S. law.[47] In this case, two dissenting Supreme Court justices argued that the Court should consider the issue of American involvement in Vietnam.[48] Justice Stewart, one of the dissenters, would have had the Court decide a number of "large and deeply troubling questions" that the majority refused to find were within the decision-making domain of the Court.[49]

For courts in the United States, the justiciability of domestic issues is inextricably linked to the fundamental principle of separation of powers as outlined in the U.S. Constitution.[50] The concept of separation of powers is also integral to justiciability of foreign relations issues, where the concept embodies the necessity for the United States to speak to the world with one voice.

2. Japanese Approach

The Japanese Supreme Court considered the issue of justiciability of foreign relations questions in *Sunakawa v. Japan.*[51] *Sunakawa* is the only Supreme Court

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44. Baker v. Carr, 369 U.S. at 212.

45. *Id.*

46. *Id.*

47. 389 U.S. 934 (1967).

48. The dissenting justices wanted the Court to determine whether Congress was constitutionally empowered to play a more active role in the initiation and conduct of war. *Id.* at 936. The dissent stated that while the President might have to take emergency action to protect U.S. security, if he were going to use U.S. armed forces in another manner, Congress must act as a check on such Executive action. *Id.* According to the dissent, a declaration of war would not correctly reflect the very limited objectives of the United States with respect to Vietnam. *Id.*

49. Several questions that Justice Stewart would have decided were:

(1) Is the present United States military activity in Vietnam a 'war' within the meaning of Article I, Section 8, Clause II, of the Constitution?
(2) If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?
(3) Of what relevance to Question [2] are the present treaty obligations of the United States?
(4) Of what relevance to Question [2] is the joint Congressional ('Tonkin Bay') Resolution of August 10, 1964?
(a) Do present United States military operations fall within the terms of Joint Resolution?
(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

Mora v. McNamara, 389 U.S. at 935.

50. Baker v. Carr, 369 U.S. at 210.

51. For a discussion of the *Sunakawa* case, *see* MAKI *supra* note 36, at 298-361; Yokota, *Political*

decision directly interpreting the meaning of Article 9, the Renunciation of War clause, which is the most controversial article in the Japanese Constitution.[52] The issues raised in *Sunakawa* were the constitutionality of the U.S. military bases in Japan[53] and the legal standing of the Status of Forces Agreement (SOFA), which was an administrative agreement signed without the express sanction of the Japanese legislature.[54]

Because of the far-reaching political, legal, diplomatic and military implications of the case, the Japanese Supreme Court took almost seven months to render its decision[55] upholding the legality of the U.S. military presence in Japan. The Court held that Article 9 did not deny the right of self-defense to Japan. Further, the court defined the term "war potential" used in paragraph two of the Article to mean the war potential under the command and control of Japan rather than the war potential of foreign armed forces. Although the decision in *Sunakawa* was unanimous, no fewer than ten justices wrote supplementary opinions. A significant area of disagreement among the justices concerned the court's right to review treaties and other acts of the government.

In one supplementary opinion, Justices Fujita Hachirō and Iriye Toshio discussed how the Japanese Constitution establishes the separation of powers — legislative, executive, and judicial — in the Japanese government. They stated

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Questions and Judicial Review: A Comparison, in THE CONSTITUTION OF JAPAN 141-66 (Henderson ed. 1969).

52. Article 9 of the Japanese Constitution states:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.
>
> 2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

MAKI, *supra* note 36, at 413.

53. The Sunakawa Incident occurred at Tachikawa air base, a major U.S. installation close to Tokyo, on July 8, 1957. Earlier, Japanese and American authorities had agreed to extend a base runway. Local citizens objected to the extension and confronted the surveyors when they arrived. The confrontation developed into a riot during which some protestors trespassed on the base. Although the trespassers neither damaged U.S. equipment nor injured American personnel, the Japanese police arrested the trespassers for illegal entry. MAKI, *supra* note 36, at 298-299.

The Tokyo District Court found the protestors not guilty because they had been charged under the Special Criminal Law, which, the court stated, had been illegally enacted in the implementation of the Japan-United States Security Treaty of 1951, under which the United States was to protect Japan from aggression. The court declared this Treaty unconstitutional because the treaty provided for the stationing of U.S. forces in Japan. *Id.* at 299. The court found that those forces constituted war potential — the maintenance of which was forbidden by Article 9. Therefore, the court reasoned, finding the defendants guilty would contravene Article 31 of the Japanese Constitution which provides that no person shall suffer a criminal penalty "except according to procedure established by law." *Id.*

54. With respect to the subject of an administrative agreement signed without the sanction of the legislature, students may compare the Japanese judicial position with the views of other nations. *See, e.g.*, W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS (1971); H. BRIGGS, THE LAW OF NATIONS (2nd ed. 1952).

55. MAKI, *supra* note 36, at 299.

that the courts have the power to review all legislative and executive acts to the extent that the acts involve legal disputes. This recognition of judicial supremacy over the legislative and executive branches is a special characteristic of the Japanese Constitution. However, all justices agreed that a limit to the supremacy of this judicial power does exist.

The Court viewed the Security Treaty, under which the United States provided military protection to Japan, as having an important relation to the security and peace of Japan as a sovereign nation. Because both the House of Representatives and House of Councillors had carefully considered the Treaty and its constitutionality, the Supreme Court refused to review the legality of the Treaty.

3. Comparative Analysis

The courts of Japan and the United States have treated the issue of justiciability in a similar manner. According to the Supreme Courts of both nations, acts of state which have a primarily political nature are beyond the limitations of a court's power of review. Accordingly, the courts must leave these decisions to the political bodies that are directly responsible to the citizens.

In addition, as the decisions in *Baker v. Carr* and *Sunakawa v. Japan* demonstrate, when either American or Japanese courts are faced with foreign policy questions such as treaties or trade policies, their right of constitutional review is strictly limited unless the governmental act is clearly and obviously unconstitutional and invalid. As in the United States, the limitation on the judicial review power of Japanese courts is primarily rooted in the concept of separation of powers, as outlined in the Constitutions of both nations.

However, as indicated in *Mora v. McNamara,* some American justices would like the U.S. Supreme Court to expand its "checks and balances" role into the political question area when a question arises as to whether the executive branch of the government has overstepped its authority by authorizing military acts in the absence of a Declaration of War by Congress.

B. *Rulings on Obscenity*

An examination of the rulings on obscenity and freedom of expression in the United States and Japan provides a second useful basis for a comparative analysis of the two legal systems. As an introduction to the issue, students may find a comparison of the U.S. Supreme Court cases, *Roth v. United States,*[56] *Ginsberg v. New York,*[57] and *Miller v. California,*[58] and the Japanese Supreme

56. 354 U.S. 476 (1957).
57. 390 U.S. 629 (1967).
58. 413 U.S. 15 (1973).

Court case, *Koyama v. State*[59] to be helpful. For additional insight, students should compare Article 175 of the Japanese Criminal Code,[60] which codifies the Japanese obscenity law, with the American Law Institute Model Penal Code[61] concerning the same subject.

1. American Approach

In the landmark decision of *Miller v. California,*[62] the U.S. Supreme Court reaffirmed previous rulings[63] that the first amendment does not protect the distribution of obscene materials,[64] and enunciated a new three-pronged test for judging obscenity:

> (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

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59. Decision of Mar. 13, 1952, 11 Sai-han Keishū 997 (Grand Bench). For a discussion of the *Lady Chatterley's Lover* decision, *see* MAKI, *supra* note 36, at 3-37.

60. THE AMERICAN SERIES OF FOREIGN PENAL CODES: A PREPARATORY DRAFT FOR THE REVISED PENAL CODE OF JAPAN (B. George Jr. ed. 1964) [hereinafter cited as DRAFT PENAL CODE].

61. MODEL PENAL CODE § 251.4 (Proposed Official Draft 1962). This proposed Code would regulate the distribution and sale of obscene material as follows:

> *Dissemination Prohibited.* Except as provided in subsection (4), a person who disseminates obscenity commits a misdemeanor. . . . A person disseminates obscenity if he (a) sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture record, or other representation or embodiment obscene; or (b) presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or (c) publishes, exhibits or otherwise makes available anything obscene. . . .
>
> (2) *Obscene Defined, Method of Adjudication.* A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or circumstance of its dissemination to be specially designed for or directed to such an audience. . . .

Id.

62. 413 U.S. 15 (1973). This case involves the application of a state's criminal obscenity statute to a situation in which sexually explicit materials have been sent through the mail to recipients who had not indicated a desire to receive them.

63. United States v. Roth, 354 U.S. 476 (1957); Memoirs v. Attorney General of Massachusetts, 383 U.S. 413 (1966). For a discussion of other obscenity cases, *see* Kim, *Constitution and Obscenity: Japan and the USA,* 23 AM. J. COMP. L. 255, 270-77 (1975) [hereinafter cited as Kim, *Constitution and Obscenity*].

64. The Supreme Court has stated that the first amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. Roth v. U.S., 354 U.S. at 484; Miller v. California, 413 U.S. at 34. "The protection given to speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter." *Id. See* Kois v. Wisconsin, 408 U.S. 229 (1972); Thornhill v. Alabama, 310 U.S. 88 (1940).

> applicable state law;[65] and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[66]

The Court further stated that no one can be prosecuted for the sale or exposure of obscene materials unless the materials depict or describe patently offensive "hard core" sexual conduct as specifically defined by the regulating state law, as written or construed.[67]

In *Miller,* the Court was also concerned with ascertaining which forms of expression may be regarded as "speech" within the purview of the first amendment. In this regard, the Court allows state courts to use a variable obscenity standard as opposed to a national standard. This variable test allows the definition of speech to accommodate varying judgments about the work's social impact in different communities.[68] Under this test, the Court will consider the artistic and intellectual value of the work and will give considerable weight to the value of freedom of speech. This approach guards against the infringement of the fundamental right of free speech.

2. Japanese Approach

In *Ishii et al v. Japan,*[69] the prosecution charged the defendants with obscenity in connection with the translation and publication of *Histoire de Juliette, ou les Prospérités du Vice* by the Marquis de Sade. The indictment charged that fourteen passages in the second of two volumes were obscene.[70]

The Tokyo District Court ruled that under Article 175 of the Japanese Penal Code, a writing was obscene and the author could be prosecuted only if the writing contained three elements; first, the writing had to unnecessarily excite or stimulate sexual desire; second, the writing had to offend the normal sense of embarrassment; and, third, the substance of the writing had to go beyond accepted moral concepts regarding sex. The Tokyo High Court[71] ruled that the fourteen passages in question were obscene because they sufficiently met the test

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65. The Court gave a few "plain examples" of what a state statute could define for regulation under subsection (b) of the standard announced in *Miller:* "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals." 413 U.S. at 25.

66. Miller v. California, 413 U.S. at 24 (1973).

67. *Id.* at 27.

68. *Id.* at 31.

69. This case is discussed in ITOH & BEER, *supra* note 36, at 183-217.

70. The original work, a literary and ideological novel, criticized the Christian civilization and advocated elimination of the existing moral, religious and social order. Hanrei Taimuzu 96, No. 240 of 1969.

71. The High Court is one of four courts beneath the Japanese Supreme Court. The other three courts are the District Court, Family Court and Summary Court.

of unnecessarily exciting or stimulating sexual desire, although the court acknowledged that the work was not pornography.

The Japanese Supreme Court affirmed the Tokyo High Court's decision and reiterated two rulings in *Koyama v. State*.[72] First, the Court stated, a particular work may be literary and ideological, but if it also is obscene, its author is not immune from criminal prosecution. Second, a defendant may not invoke the principles of Articles 21[73] and 23[74] of the Constitution to escape the obligations of the public welfare concept with respect to the issue of obscenity.

The Court ruled that the protection of a sexual code and the maintenance of a minimum sexual morality are part of the public welfare. Under this theory, the law will not excuse the obscene nature of a composition even if the work has high artistic merit. The Court stated that the courts must guard society against moral degeneration in accordance with the norms of the prevailing social ideas. They added that neither the courts nor the laws must necessarily affirm social realities; rather, the courts must confront evil and corruption with a critical attitude and must play an active role in determining obscenity standards.

However, for the first time, the Court clearly ruled that the courts should not consider the obscenity of a particular passage separately, but instead should judge such obscenity within the context of the work as a whole. The Court also recognized that prevailing public perceptions regarding sex and obscenity gradually change and that the Court would note these changes as they occur.

3. Comparative Analysis

The *Ishii* case demonstrates that, in adjudicating obscenity cases,[75] the Japanese Supreme Court has the propensity to act as the guardian of public morality by applying its own interpretation of "public welfare."[76] The Japanese Supreme Court has formulated its own definition of obscenity and decides cases with reference to that independent definition.

Although the Court applies a balancing test in obscenity cases, the balance favors public morality over free speech of the individual; therefore, Japanese

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72. Decision of Mar. 13, 1952, 11 Sai-han Keishū 997 (Grand Bench). For a discussion of the *Koyama* case, see Kim, *Constitution and Obscenity*, *supra* note 63, at 257-62.

73. Article 21 of the Japanese Constitution states: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. . . .

"No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." MAKI, *supra* note 36, at 414.

74. Article 23 of the Japanese Constitution states: "Academic freedom shall be guaranteed." *Id.*

75. The Japanese Supreme Court has used three tests in deciding the obscenity cases: the public welfare standard, the "prevailing ideas of society" standard, and the "art-obscenity two dimensional" standard. For a discussion of these standards, *see* Kim, *Constitution and Obscenity*, *supra* note 63, at 277-82.

76. In the *Ishii* case, the Japanese Supreme Court was concerned primarily with public welfare considerations. The Court, in fact, gave no indication that it will give preference to an individual's right to freedom of speech and expression as guaranteed by Article 21 of the Japanese Constitution.

government regulations on obscenity have been more easily upheld[77] than American regulations.

The student should note that the balancing test used in Japan lends itself to a considerable amount of subjectivity. The *Ishii* majority appeared to substitute its own "proper concept of sexual morality" for the prevailing ideas of the community. Acting in conformity with its "guardian" function, the Japanese Supreme Court found no error when the lower court rendered its decision without determining the effects the work might have on the average person.

In contrast, the U.S. Supreme Court does not regard its role as that of guardian of the public morality, and allows an infringement of the fundamental right of freedom of speech only where a compelling state interest can be shown. Therefore, in the United States, the burden of proof lies with the government, while in Japan, the burden of proof lies with the individual claiming to have been aggrieved.[78] In addition, the U.S. Supreme Court will not set its own independent standards of obscenity and has emphasized that the Court's function does not include proposing regulatory schemes for the states.[79] Obscenity in the United States is both a question of fact and a question of law. The Court in *Miller* held that the issue of whether a work is obscene is a question of fact for the jury. However, in *Jenkins v. Georgia,*[80] the Court held that judges should not give jurors unbridled discretion to determine what is "patently offensive." American appellate courts will conduct an independent review of constitutional claims where necessary to guarantee that the materials in question depict or describe patently offensive "hard-core" sexual conduct.[81] Japanese appellate courts will not conduct such an independent review unless the facts of the case are in dispute.

Also, in contrast to the U.S. Supreme Court decision in *Miller,* the Japanese Supreme Court will not consider the artistic and intellectual value of a work in determining whether the work is obscene. Under the Japanese standard, a work is classified more easily as "obscene" because artistic and intellectual values are not independent considerations, and individual fundamental rights have no greater preference than public welfare interests. A perusal of U.S. decisions indicates a greater reluctance to sacrifice an individual's freedom of expression

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77. In the United States, courts have historically held that "obscenity" is not "speech" and hence is not within the purview of first amendment rights. In defining obscenity, the U.S. Supreme Court has engaged in a variety of approaches, which generally indicate an unwillingness to sacrifice first amendment rights for public morality. In contrast, although the Japanese Court also uses a balancing test in applying the constitutional standard of obscenity, the Court gives greater deference to the government interest in maintaining public morality.

78. Kim, *Constitution and Obscenity, supra* note 63, at 269-70.

79. Miller v. California, 413 U.S. at 27.

80. 418 U.S. 153 (1974).

81. Miller v. California, 413 U.S. at 25.

for the public morality; hence, a state's discretion to regulate is limited to "hard-core sexual conduct."[82]

C. *Constitutionality of the Death Penalty*

The Supreme Courts of both the United States and Japan have considered the question of whether capital punishment violates their respective Constitutions. This area is good for comparison because several significant points of agreement and disagreement exist between the courts and the citizens of both nations.

1. American Approach

In 1972, the California Supreme Court held that the death penalty violated the state constitutional provision proscribing "cruel or unusual punishment."[83] In the same year, the U.S. Supreme Court in *Furman v. Georgia*[84] also held the death penalty to be unconstitutional. However, the Supreme Court decision was limited to the particular fact situation in *Furman*. The Court held specifically that where a state convicts a black defendant in state court of murder or rape after a trial in which state law gives the jury absolute discretion to impose the death penalty, the imposition of the death sentence could constitute "cruel and unusual punishment" in violation of the eighth and fourteenth amendments. Due primarily to the absence of agreement among the justices in the *Furman* case, the questions if and under what circumstances the death penalty could be constitutionally imposed were unclear.[85]

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82. This line of court decisions primarily follows the *Miller* mandate. *See* People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1976); State v. Wedelstedt, 213 N.W. 2d 652 (Iowa 1973); State v. Shreveport News Agency, Inc., 287 So. 2d 464 (La. 1973); Commonwealth v. Horton, 365 Mass. 164, 310 N.E. 2d 316 (1974); People v. Bloss, 394 Mich. 79, 288 N.W. 2d 384 (1975); ABC Interstate Theatres, Inc. v. State, 325 So.2d 123 (Miss. 1976); McCright v. Olson, 367 F. Supp. 937 (D.N.D. 1973). Commonwealth v. MacDonald, 464 Pa. 435, 347 A.2d 290 (1975).

83. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, *cert. den.*, 406 U.S. 958 (1972). The Constitution of the State of California reads in part: "Cruel or unusual punishment may not be inflicted." CAL. CONSTIT. art. I, § 17.

The concept of "cruel and unusual punishment" is not susceptible to precise definition. In a recent decision, a California Superior Court judge ruled that overcrowding and understaffing of the San Diego County jail constituted "cruel & unusual punishment" and ordered the county to make changes. San Diego Union, May 13, 1980, at 1, col. 3.

84. 408 U.S. 238 (1972).

85. Justice Douglas, in a concurring opinion, stated that the death penalty was "unusual" if, in its application, the state discriminated against the defendant by reason of his race, religion, wealth, social position, or class. Douglas further stated that if the state imposed the death penalty under a procedure which left room for selective application of the penalty to minorities, the punishment was "cruel and unusual." *Id.* at 240-57. According to Justice Douglas:

> There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the 8th Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Id.* at 242 (quoting Granucci, *"Nor Cruel and Unusual Punishment Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

However, in the 1976 case of *Gregg v. Georgia,*[86] the Supreme Court held that the imposition of the death penalty did not, in all circumstances, constitute cruel and unusual punishment. The plurality opinion pointed out that although contemporary values concerning a challenged punishment are relevant to the applicability of the eighth amendment, public perceptions of standards of decency with respect to criminal punishment are not conclusive, and a penalty must accord with the "general dignity of man."[87] According to the Court, since an assessment of contemporary standards was an important component of the constitutional test, the legislative judgment weighed heavily in ascertaining such standards. Further, the Court noted that it would presume a punishment imposed by a legislature to be valid.

History and precedent, according to the Court, supported the conclusion that the death penalty imposed for the crime of murder was not a per se violation of the eighth or the fourteenth amendments. Also, the Supreme Court had long recognized that capital punishment was not invalid per se. As the plurality pointed out, a large segment of society regarded capital punishment as an appropriate criminal sanction. For example, in response to the 1972 *Furman* decision, legislatures in 35 states enacted new statutes providing the death penalty for at least some crimes.[88]

The plurality further noted that evidence indicated that the death penalty was a significant deterrent to crime, and that a state legislature was not clearly wrong in determining that capital punishment may be necessary in some cases. Finally, the Court stated that the death penalty was not invariably disproportionate to the crime of murder.[89]

The U.S. Supreme Court has repeatedly stated that courts should not judge the legality of punishments by inflexible absolute standards. The Court measures punishments against the "evolving standards of decency that mark the progress of a maturing society."[90] In this regard, Justice Brennan has said that the government, even as it punishes, must treat its citizens with respect for their intrinsic worth as human beings. Therefore, punishments are cruel and unusual if they "do not comport with human dignity."[91] In this regard, pain may be a factor in the judgment of whether a punishment is cruel. Although the govern-

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86. 428 U.S. 153 (1976).

87. *Id.* at 173.

88. *Id.* at 179.

89. *Id.* at 180. Subsequent Supreme Court decisions upheld the rule in Gregg v. Georgia. *See* Profitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 325 (1976); Coker v. Georgia, 433 U.S. 584 (1977). For information on prisoners sentenced to death in 1978, on executions carried out from 1930 to 1978, and on trends in the evolution of capital punishment laws over the past 10 years, *see* U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1978 (1979). *See also* U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1979 (1980).

90. Trop v. Dulles, 356 U.S. 86, 101 (1957); *see also* Weems v. U.S., 217 U.S. 349 (1909).

91. Furman v. Georgia, 408 U.S. at 270.

ment may impose no physical mistreatment or primitive torture, severe mental pain may be inherent in the infliction of a particular punishment. However, this mental pain would not necessarily invalidate the punishment.[92]

According to the Court, a punishment may be degrading and, therefore, proscribed, simply because of its enormity. For example, the Court considers expatriation more primitive than torture because expatriation necessarily involves a "denial by society of the individual's existence as a member of the human community."[93] The Court will consider the infliction of a severe punishment to be cruel if the punishment is different from what society generally does under the circumstances.[94] In addition, punishments may not be excessive with pointless infliction of suffering. The punishment's excessive length, severity or disproportion to the crime committed characterizes this extreme.[95]

Students may be interested in discussing Supreme Court cases dealing specifically with permissible methods of execution. In *In re Kemmler,*[96] an early U.S. Supreme Court case, the Court noted that although the punishment of death is not cruel if weighed within the meaning of the Constitution, punishments involving torture or lingering death are cruel. The concept of cruelty, in the Court's reasoning, implies something barbarous in addition to the mere extinguishment of life. The Court rejected the contention that the infliction of death by means of electrocution constitutes cruel and unusual punishment. In so doing, the Court noted that the state passed its legislation authorizing electrocution in an effort to devise a more humane method of execution.[97] Although electrocution as a method of execution was "unusual" because of its novelty at the time, the Court did not consider it cruel on that basis alone. The Court did indicate that punishment, such as burning at the stake, crucifixion, and breaking on the wheel were manifestly cruel and unusual.[98]

Similarly, in *Wilkerson v. Utah,*[99] the Supreme Court held that the use of firing squads as a mode of administering the death penalty for first degree murder was not a cruel and unusual punishment within the meaning of the eighth amendment. The Court, in focusing on methods of execution that would be constitutionally impermissible, indicated that the eighth amendment forbids punishments of torture, such as those in which the executioner drags the prisoner to the place of execution, disembowels the prisoner alive, or beheads, or draws and quarters the prisoner.[100] In *Francis v. Resweber,*[101] the Supreme Court stated, however,

92. *Id.* at 271.
93. Trop v. Dulles, 356 U.S. at 101.
94. Furman v. Georgia, 408 U.S. at 276.
95. *Id.* at 279.
96. 136 U.S. 436 (1889).
97. *Id.* at 443.
98. *Id.* at 446.
99. 99 U.S. 130 (1879).
100. *Id.* at 135.
101. 329 U.S. 459 (1947).

that any unavoidable suffering inherent in the method of extinguishing life did not alone make a punishment "cruel" within the meaning of the eighth amendment.[102]

2. Japanese Approach

In *Ichikawa et al v. Japan,*[103] the Japanese Supreme Court considered the validity of the death penalty in light of Article 36 of the Japanese Constitution. Article 36 states: "The infliction of torture by any public officer and cruel punishments are absolutely forbidden."

In *Ichikawa,* the trial court sentenced the defendant, a convicted murderer, to death by hanging. The primary issue in the case was the validity of Cabinet Order No. 65 of February 20, 1873,[104] which specified hanging as a manner of imposing the death penalty. The Japanese Supreme Court, following a previous ruling,[105] held that the 1873 Cabinet Order did not lose its force after the adoption of the new Constitution in 1947 and that it retained its effectiveness as law. Therefore, according to the Court, only future action by the legislature could change or abolish those portions of the Order pertaining to the method of implementing the death sentence. In the absence of such legislation, the Court held, neither hanging nor the death penalty itself contravened the Article 36 proscription of cruel punishments.

Ichikawa also raised the issue that Japan's Criminal Code,[106] the Code of Criminal Procedure[107] and the Prison Law Enforcement Regulations,[108] which provide for capital punishment and authorize persons to order the imposition of the death penalty, failed to specify the manner of imposing the punishment.

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102. *Id.* at 464. *See also* Eddings v. Oklahoma, 102 S. Ct. 869 (1982), in which the Court struck down the death penalty imposed on a youthful murderer in Oklahoma. The Court warned trial judges to weigh the backgrounds of defendants under age 18 before sentencing them in capital cases.

Justice Powell, writing for the majority, noted that the defendant, who was 16 when he killed an Oklahoma highway patrolman, had grown up in a broken home without supervision, had been beaten by his father and had a retarded mental and emotional development. The Court remanded the case to the state court for a new sentencing hearing. *Id.*

Although the 5-4 ruling was very limited in scope, making no new law and avoiding the issue of whether the execution of juveniles violates the eighth amendment, the decision was notable for two reasons. First, according to the majority, in deciding whether to sentence a murderer to death, a court must consider the disturbed mental and emotional development of a defendant who is under 18 at the time of the offense. Second, a solid minority of four justices stated in their dissent that they do not believe that the eighth amendment prohibits the sentencing of a juvenile to death. *Id.*

103. This case is discussed in ITOH & BEER, *supra* note 36, at 161-64.

104. Saiko saiban-sho. Jima so-kyoku. For a translation of this Cabinet Order *see* SUPREME COURT OF JAPAN (1873).

105. Decision of Apr. 6, 1955, 9 Sai-han Keishū 663 (Grand Bench).

106. Keihō (Penal Code) Law No. 45 of 1907.

107. Keiji soshō hō (Code of Criminal Procedure) Law No. 131 of 1948 [KEIJI SOSHŌ HŌ].

108. Kangoku hō shiko risoku (Ministry of Justice Order) No. 18 of 1908.

Thus, the defense contended that the method of implementing the death penalty may, in some circumstances, violate the provisions of the Cabinet Order and would, therefore, contravene Article 31 of the Constitution. Article 31 of the Japanese Constitution provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." The Court ruled that, because it found no specific violation concerning the basic details as prescribed in the Order, the mere possibility of nonconformity to the Order's provisions would not alone invalidate the authorized method of administering capital punishment based on Article 31 of the Constitution.

In another murder case,[109] the Japanese Supreme Court stated that the state can inflict a punishment depriving an individual of his life under appropriate procedures established by law. The Court considered the threat of the death penalty to be a general preventive measure and the implementation of the penalty to be a means of protecting society from evil. In approving the death penalty, the Court reasoned that its decision gives supremacy to the concept of humanity as a whole rather than to the concept of humanity as individuals. The Court reasoned that the continuation of the death penalty is necessary for the public welfare.

The Court also noted that capital punishment is cruel when the humanitarian point of view generally recognizes the method of implementing it as cruel. Examples of such cruel methods include burning at the stake, crucifixion, boiling and impaling.

Although the Japanese Supreme Court decision in *Ichikawa* firmly established that neither the death penalty per se nor the death penalty by hanging violate the Japanese Constitution's prohibition against "cruel punishments," the capital punishment issue has been a prominent subject of public debate in Japan. However, one focus of the capital punishment debate has been slightly different than the debate in the United States.

A proposal, known as the system of postponed execution of the death penalty, has emerged from the public controversy. An examination of the proposal's genesis and content adds to an understanding of the Japanese attitudes on capital punishment and sharpens the comparison with the American position.

The 1961 draft of the Japanese Penal Code,[110] prepared by the Japanese Legal System Deliberation Council,[111] contained Article 34 which stated: "1. The

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109. Decision of Mar. 12, 1948, Hanreishū, II, No. 3, 191 (Criminal) (Grand Bench). This case is discussed in MAKI, *supra* note 36, at 156.

110. Kaisei Keihō jumbisōan (The 1961 Preliminary Draft of a Revised Penal Code, Ministry of Justice, A Preparatory Draft for the Revised Penal Code of Japan 1961) (Tokyo, 1963).

111. For an explanation of the role of the Council and the Japanese efforts to revise the Penal Code, *see* Kim, *Asian Criminal Law: A Comparison with Proposed Federal Criminal Code*, 14 S. TEX. LAW J. 43, 48-50 (1973).

death penalty shall be inflicted by hanging. 2. A person sentenced to death shall be incarcerated in a penal institution until his execution."[112]

Under this provision, the court, in imposing the death penalty, may postpone execution of the sentence for five years, if the court considers that the circumstances warrant such a postponement.[113] Although the committee rejected the proposed system of postponed execution of the death penalty,[114] both sides developed extensive arguments on the issue.

Advocates of the establishment of the system of postponed execution of the death penalty argued that legal drafters should carefully consider the humanitarian world trend to abolish or at least limit the use of the death penalty. Second, the advocates argued that in some cases the motive behind the criminal act, the mental status of the offender, the offender's attitude after committing the crime, and the low degree of potential danger to society posed by the offender did not warrant the death penalty. Third, proponents asserted that by prescribing the death penalty in the Code, and by delegating discretionary power to judges, the law could maximize the deterrent effect of the death penalty. The advocates of the system also argued that another check on the imposition of the death penalty would not not decrease its deterrent effect since clemency was rarely extended to those offenders receiving the death penalty. Finally, they noted that the public had begun to favor the system.

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112. DRAFT PENAL CODE, *supra* note 60, at 30-31.

113. These two proposed provisions drew criticism from legal drafters who advocated the abolition of the death penalty. The Council's Special Committee on Criminal Law adopted the two provisions proposed by the 1961 draft, taking into consideration the national sentiment and the level of criminal activity. Suzuki, *Dainizi Sankoanno Sakuseito Bukaishingi* (pt. 1), 489 JURISTO 117, 129 (1971). However, the Second Subcommittee, whose primary responsibility is handling questions related to punishment, took the position that even if the death penalty is to be maintained, the sentence and execution should be minimized. Thus, the subcommittee studied various means to achieve this goal including: placing a restriction on imposing the death penalty in cases involving murder; requiring a psychiatric test for defendants in death penalty cases; requiring the unanimous decision of judges imposing the death sentence; adopting the system of postponed execution or suspended execution of the death penalty; and utilizing clemency (with reduced sentences) in death penalty cases. *Id.*

The proposal to adopt the system of postponed execution or suspended execution of the death penalty became the subject of serious discussion by the subcommittee. From this discussion, the subcommittee prepared a draft proposal to promote this system for the Special Committee on Criminal Law. The proposal consisted of three measures. First, when imposing the death penalty, the court can render a sentence with the postponed execution of the death penalty for five years if the court can recognize the circumstances which would warrant the reservation of the execution of this penalty, taking into consideration the objective of punishment. Under this approach a person whose execution of the death penalty is postponed would be detained in a penal institution to receive correctional treatments.

Second, when the period of postponed execution of the death penalty expires, the court, upon receipt of opinions of the Deliberation Committee on Death Penalty, can convert the death penalty to life imprisonment or confinement unless a need for the execution of the death penalty exists. *Id.*

Third, any offender whose death penalty is reduced to life imprisonment is not entitled to ask for a parole until after the expiration of 20 years from the date of the imposition of the death penalty. *Id.*

114. Suzuki, *Dainizi Sankoanno Sakuseito Bukaishingi* (pt. 2), 489 JURISTO 117, 118-9 (1971).

According to opponents of the postponed execution system, courts were already cautious in rendering death sentences; therefore, sound reasons usually existed for imposing the death sentence. Opponents also claimed that adoption of the system would substantially decrease the deterrent power of the death penalty. They asserted that limited application of the death penalty could be as effectively achieved through the actual trial practice of judges and attorneys. Opponents finally argued that the creation of a five-year waiting period was more psychologically inhumane than immediate execution.

3. Comparative Analysis

The approaches of both the Japanese and the U.S. Supreme Court to capital punishment have much in common. In fact, the Japanese and U.S. decisions contain more similarities than differences. Both Courts have acknowledged that their respective constitutional framers accepted capital punishment. The courts of both nations also have consistently recognized that capital punishment, particularly for the crime of murder, is not invalid per se nor is it invariably disproportionate to the crime. Similarly, the Supreme Courts of both nations adhere to the principle that although a legislature may not impose excessive punishments, it need not choose the least severe penalty possible. In both countries a heavy burden rests upon those challenging the judgment of the legislature. Further, according to both Supreme Courts, retribution and the possible deterrent factor of capital punishment is a permissible factor for the legislatures to consider in determining whether the death penalty should be imposed.

The Japanese Supreme Court, like the U.S. Supreme Court, has indicated that it will consider evolving societal attitudes and standards in considering the validity of capital punishment in the future. On this issue, however, the two Courts have differed in their approaches. As in obscenity cases, the Japanese Supreme Court tends to act as the guardian of the public welfare in cases involving the death penalty. Further, the Court generally holds the rights of society prior to those of the individual. The Japanese Supreme Court is not averse to using its own perception of evolving societal standards, rather than that of the legislature or the general public.

The U.S. Supreme Court also considers the public welfare. But, in contrast to the Japanese, the Court is primarily concerned with the rights of the individual. This concern for the rights of the individual is indicated by the Court's focus, in both *Furman* and *Gregg*, on the dangers of allowing the death penalty to be arbitrarily imposed by juries who may selectively impose the death sentence. U.S. legislatures and courts have not specifically focused on the concept of postponed execution of the death penalty. However, the delays inherent in the American appeals process make immediate execution of convicted individuals impossible in any event.

D. *"Right" to Education Cases*

1. American Approach

The U.S. Constitution does not explicitly contain a right to education. In *San Antonio School District v. Rodriguez,*[115] the U.S. Supreme Court rejected the argument that the Constitution implies such a fundamental right to education. The Court ruled that state statutes which regulate education are constitutional as long as they bear a rational relation to a legitimate governmental objective. At issue in *Rodriguez* was the validity of school funding based on property taxes, a system which permitted a wide variance in the quality of education between districts. The Court held that this particular method of school funding was rationally related to the legitimate governmental goal of providing a minimum education.[116]

Since the U.S. Supreme Court repeatedly has rejected any argument that education is either explicitly or implicitly a constitutionally guaranteed right, individual states have retained relatively unfettered control over this aspect of school policy. California, in exercising its control, for example, has abolished the collection of textbook fees. A California statute explicitly provides that: "[n]o school official shall require any pupil . . . to purchase any instructional material for the pupil's use in the school."[117] Other state legislatures have also passed laws on this issue which have been upheld by both their state courts and the U.S. Supreme Court.[118] The trend among states is to prohibit the collection of fees for mandatory textbooks.

2. Japanese Approach

In *Kato v. Japan,*[119] the Japanese Supreme Court confronted the issue of the constitutionality of charging fees for textbooks in a compulsory education system. Article 26 of the Japanese Constitution provides:

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115. 411 U.S. 1 (1973).

116. *Id.*

117. CAL. EDUC. CODE § 60070 (West 1978).

118. The Indiana Court of Appeals ruled that the State's constitutional mandate of "free" public schools did not require the legislature to provide free textbooks; a textbook rental fee was therefore permissible. Chandler v. South Bend Community School Corp., 160 Ind. App. 592, 312 N.E.2d 915 (1974). The Supreme Court of New Mexico ruled that the state constitutional provision requiring "free" public schools prohibited imposition of textbook fees for required courses, but did not prevent exaction of fees for elective courses. Norton v. Board of Educ. of School Dist. No. 16, 89 N.M. 470, 553 P.2d 1277 (1976). The Montana Supreme Court ruled that, although fees could not be charged for textbooks, reasonable fees were valid if charged for an activity unrelated to a recognized academic or educational goal of the school. Granger v. Cascade County School Dist., 159 Mt. 516, 499 P.2d 780 (1972). Similarly, the U.S. Supreme Court affirmed an Arizona court ruling upholding the imposition of textbook fees and the failure to provide free textbooks for indigents. Carpio v. Tucson High School Dist. No. 1 of Pima County, 111 Ariz. 127, 524 P.2d 948 (1974), *cert. den.*, 420 U.S. 982 (1974).

119. This case is cited and discussed in ITOH & BEER, *supra* note 36, at 147-9.

> All people shall have the right to receive an equal education, correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

The guardian of a public elementary school pupil sued the government for reimbursement of textbook fees, arguing that since Article 26 requires the state to provide a free, compulsory education system, the government should pay for all necessary textbooks during compulsory years of education.[120]

The Japanese Supreme Court found that the Article 26 guarantee of equal educational rights and a "free" minimum compulsory education up through grade nine did not require the state to bear all educational expenses. The Court reasoned that because education is necessary for a child's maturation and character development, a child's guardian has a constitutionally-imposed obligation to educate his children. Due to this dual obligation on the part of the state and the guardian, expecting the state to assume all educational expenses would be unreasonable. According to the Court, the term "free," as used in Article 26 refers only to tuition for compulsory education.[121] The Court concluded that the issue of textbook purchase fees is a matter of legislative concern.

3. Comparative Analysis

Unlike the U.S. Constitution, the Japanese Constitution explicitly grants its citizens the right to a free, equal education up to a specified minimum level. Although no state in the United States is obligated to provide its citizens with a minimum education, states have individually undertaken to provide a free, public education up to a certain grade level. In fact, the majority of states require youths to attend school until they reach a designated age.

Like the Court in *Kato v. Japan,* which decided that the Japanese Constitution does not require the state to bear all non-tuition costs necessary for even compulsory education, various state courts and the U.S. Supreme Court have upheld the collection of textbook fees for required courses.[122] However, the Court in *Kato* did suggest that the state, via legislation, should attempt to lessen the financial burden borne by parents and guardians of school children. The U.S. Supreme Court similarly has allowed state legislatures to regulate almost all aspects of education, including the collection of textbook fees, as long as statutes are "rationally related" to the legitimate objective of providing a minimum educa-

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120. *Id.*

121. Fundamental Law of Education, Law No. 25 of Mar. 31, 1947, art. 4 & 6; Proviso of the School Education Law, Law No. 25 of Mar. 31, 1947 (both of which prohibit charging of tuition) *reprinted in* ITOH & BEER, *supra* note 36, at 148.

122. *See* note 118 *supra.*

tion. Although constitutionally permitted to charge for instructional materials related to compulsory courses in public schools, many states in the United States have followed the trend to prohibit the collection of such fees.[123]

E. *Contested Election Cases*

1. American Approach

In the United States, the federal Constitution, as well as various state constitutions, provides that "each house shall be the judge of the election, returns and qualifications of its own members."[124] Thus, in the event of an election contest, only the legislature may determine whether its procedures have been regularly followed.[125] Federal and state courts have held consistently that the courts have no jurisdiction in this area.[126] The courts have invoked the doctrine of separation of powers by asserting either the political question doctrine or the abstention doctrine.[127]

The case of *Bond v. Floyd*[128] brought a challenge to the legislature's exclusive power to judge its own members' qualifications for office. For the first time, a court assumed jurisdiction to determine the qualifications of a member-elect of a legislative body, notwithstanding a constitutional grant of authority to the legislature.

The Georgia House of Representatives deprived Julian Bond, a duly elected member, of his seat based on the legislators' belief that, in light of Bond's criticism of U.S. policies in Vietnam and the Selective Service laws, Bond could not properly uphold the oath of office as required by the Georgia constitution. Bond sought injunctive relief, claiming that his exclusion from the House on the basis of his political statements infringed his right of free expression under the first amendment. Unanimously reversing the lower court decision, the Supreme Court held that Bond's exclusion was, in fact, a violation of his first amendment guarantee of freedom of speech. In so holding, the Court rejected the contention that a state could demand a stricter degree of loyalty from its elected officials than it could from ordinary citizens. The Court reasoned that a legislator must

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123. *Id.*

124. U.S. CONST. art. I, § 5.

125. *Id.*

126. 9 WM. & MARY L. REV. 245, 247 (1967). The Constitution of the State of California, for instance, prescribes that: "Each house of the legislature must judge the qualifications and elections of its members." CAL. CONST. art. IV, § 5 (amended 1976). In a case involving a contest after a primary election of an assemblyman, the California Supreme Court held that the legislature cannot delegate its jurisdiction to the courts, either directly or indirectly, by authorizing the courts to decide election contests. Markwort v. McGee, 26 Cal. 2d 592, 226 P.2d 1 (1951).

127. 17 L. Ed. 2d 911, 912 (1966). *See* notes 40-46 and accompanying text *supra.*

128. 385 U.S. 116 (1966).

be free to discuss major issues and is entitled to the same constitutional protection afforded other citizens.[129]

2. Japanese Approach

In *Iwasaki v. Japan*,[130] the Japanese Supreme Court considered the issue of contested elections. In this case, an Assemblyman's campaign manager was convicted of violating the Public Office Election Law which prohibited bribery in connection with elections.[131] Two voters in Iwasaki's voting district challenged the validity of Iwasaki's election to the Assembly arguing that conviction of a candidate's campaign manager for violating the Election Law invalidated the election. The lower court agreed and voided the election. On appeal to the Japanese Supreme Court, Iwasaki contended that Articles 211[132] and 251-a[133] of

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129. For a discussion of the *Bond* case, *see* Finegold, *Julian Bond and the First Amendment Balance*, 29 U. PITT. L. REV. 167 (1967).

130. This case is discussed in ITOH & BEER, *supra* note 36, at 150.

131. Law No. 100 of April 15, 1950.

132. Article 211 of the Public Office Election Law provides:

> 1. Electors or candidates may initiate a suit against a successful candidate for a public office within thirty days from the election at a High Court, seeking a court decision to invalidate the latter's victory on grounds of Article 251-2, paragraph 1 (disqualification of a successful candidate due to an election law violation by his manager or treasurer, when an election campaign manager or treasurer of the successful candidate has been convicted of having committed a crime under Article 221 (bribery and inducement for special interests); Article 222 (bribing for the interests of a plurality of people); Article 223 (bribing for the interests of candidates, both successful and unsuccessful); or Article 223-2 (an unlawful use of newspapers and magazines).
> 2. Electors or candidates may initiate a suit against a successful candidate for a public office within thirty days from the election at a High Court, seeking a court decision to invalidate his victory on grounds of provisions of Article 251-2, paragraph 2 (disqualification due to a violation by a campaign treasurer of the legally-fixed election expenditures, when a campaign treasurer has been convicted of the offense of spending in excess of the amount allowed by law, as stipulated in Article 247 herein.

Id.

133. Article 251-2 of the Public Office Election Law provides:

> 1. A successful candidate shall be disqualified when his election manager or treasurer has been indicted and convicted of having committed a crime under Article 221 (bribery and inducement for special interests); Article 222 (bribing for the interests of a plurality of people); Article 223 (bribing for the interests of candidates, both successful and unsuccessful); or Article 223-2 (an unlawful use of newspapers and magazines). But in case an act falls under the provisions of any one of the items below, it will be decided otherwise, as long as the alleged offense is concerned.
>
> (1) When a person other than an election campaign manager or treasurer instigates acts stipulated herein with the intention of defeating his own candidate in collaboration with an opposing candidate or his campaign workers.
>
> (2) When the manager or treasurer commits the crime stipulated herein in collaboration with opposing candidates or their campaign workers with the objective of defeating the opponent(s).
>
> 2. A successful candidate shall be disqualified when his campaign treasurer is charged and convicted with violating Article 247 (the lawful limit of campaign expenditures). The proviso in the preceding paragraph shall be applicable hereto.

Id.

the Public Office Election Law violated Articles 13,[134] 15[135] and 31[136] of the Japanese Constitution.

Iwasaki raised the constitutional issue of whether the election statutes violated Article 13's provision that "all people shall be respected as individuals." Iwasaki argued that invalidating his election based on the actions of another party unconstitutionally held him accountable for the acts of others and amounted to imposing guilt by association. Iwasaki also argued that the application of Section 251-2 of the Public Office Election Law contravened the intent and spirit of Article 15 of the Constitution, which allowed voters to choose their candidates free from governmental interference. Finally, Iwasaki argued that Section 251-2 of the election statute violated his right to due process of law under Article 31 of the Constitution.

The Supreme Court dismissed Iwasaki's appeal reasoning that the revision of the Public Office Election Law, as effected by Law 207 of December 1954,[137] strengthened the election law provision concerning guilt by association by requiring a successful candidate to have paid proper attention to the selection and supervision of his election campaign manager. The Court rejected Iwasaki's constitutional arguments on the grounds that the public interest outweighed the individual's interest. The Court explained that the intention behind the strengthened regulations concerning guilt by association was to insure a fair election of public officials by a free expression of voters' decisions. The Court reasoned that since a manager in an election campaign acts as a principal promoter for a given candidate and exercises supervisory authority over every aspect of the election, a manager who had violated the provisions of Article 251-2 of the Public Office Election Law would probably affect not only the election of his candidate, but also the free nature of the votes cast for the particular candidate. Therefore, according to the Court, since such an election

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134. Article 13 of the Japanese Constitution provides: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." MAKI, *supra* note 36, at 413.

135. Article 15 of the Japanese Constitution reads:

> The people have the inalienable right to choose their public officials and to dismiss them.
> 2. All public officials are servants of the whole community and not of any group thereof.
> 3. Universal adult suffrage is guaranteed with regard to the election of public officials.
> 4. In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.

MAKI, *supra* note 36, at 414.

136. Article 31 of the Japanese Constitution provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." MAKI, *supra* note 36, at 415.

137. For a translation and discussion of this Law, *see* ITOH & BEER, *supra* note 36, at 152-53.

would not have been fair, nullifying the candidate's victory would conform to the spirit of the election system, even if the candidate had not been negligent in selecting and supervising his campaign manager.[138]

3. Comparative Analysis

As the foregoing discussion demonstrates, the Japanese approach in dealing with contested election proceedings contrasts sharply with the U.S. approach. The *Iwasaki* case indicates that the Japanese judiciary may invalidate election returns involving a member of the national or prefectural legislatures if either the candidate or one of his close advisors committed any substantial illegal act. Furthermore, where a candidate's manager or treasurer has violated the Election Code, the courts may hold the candidate himself accountable through the election invalidation proceeding, regardless of any personal knowledge, guilt or negligence by the candidate.

In contrast, the U.S. Constitution mandates the non-involvement of the courts in determining the manner of holding elections,[139] judging returns, or assessing the qualifications of members of legislatures — a function committed to the legislature. However, the U.S. Supreme Court in *Bond* created an exception to the general rule where the procedural standards used by the legislature for determining qualifications of its members have the effect of impinging on individual constitutional rights.

F. *Religious Freedom Cases*

1. American Approach

In cases dealing with the issue of freedom of religion, the courts in the United States have promulgated a balancing test, weighing the state's interest in maintaining a well ordered society against the freedom of the individual to act in accordance with the dictates of his religion. Some of the earliest and strictest American cases allowing constraints on religious beliefs in the face of a compelling state interest in maintaining public health and safety, were the snake-handling cases.[140] After the courts affirmed the validity of state restrictions

138. *Id.* at 153.

139. Article 1, section 4 of the U.S. Constitution provides: "The times, places and manner of holding elections, for senators and representatives, shall be prescribed in each state by the legislature thereof: But the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." U.S. CONST. art. I, § 4.

140. Hill v. State, 38 Ala. 404, 88 So. 2d 880 (1956), *cert. den.* 264 Ala. 697, 88 So. 2d 887 (1956). The snake-handling cases involved Christian Fundamentalists who believed that Jesus commanded them to handle poisonous snakes in order to strengthen the faith of others. Snake handling is central to their religion, as they believe that if their faith is strong enough, they will not be bitten, or if they are

on snake handling, at least one state went so far as to enact a statute forbidding the handling of snakes altogether.[141]

Although a few snake-handling cults still exist, the cases on this subject illustrate the willingness of the government to interfere with the practice of religion when the government perceives a real threat to public safety. State statutes prohibiting the handling of snakes, though clearly aimed at the snake cultists, have continued to withstand constitutional challenges.[142]

The rulings in the snake-handling cases, however, are exceptions to the American courts' handling of religion cases. Courts in the United States generally favor a policy of judicial restraint where the individual demonstrates a bona fide religious belief. For example, the courts will impose no legal sanction against faith healers who counsel people to refrain from medical treatment, even where the believer follows the advice and consequently dies. In effect, an adult may freely make religious choices concerning his own medical treatment.[143]

In a similar vein, American courts have taken the position that the state may regulate medical treatment. For example, diagnosis and treatment of a disease without a proper license can be either a misdemeanor[144] or a felony[145] in California. However, the California Code also specifically provides that: "nothing in this chapter shall be construed so as to . . . regulate, prohibit, or apply to any kind of treatment by prayer nor interfere in any way with the practice of religion."[146] The statute does not require a license to heal by prayer.[147] An Arizona court has held that the Native American Church is exempt from the general licensing rule. The court ruled that the Native American Church may use the drug peyote in religious rituals without a medical license.[148]

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bitten, they will suffer no ill effects. Between 1940 and 1955, when the snake-handling movement was at its height, at least 16 persons died from snake bites received at snake-handling meetings. In fact, the founder of the cult died of a rattlesnake bite in 1955. *See id.*; Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (Tenn. 1948).

141. For example, Tennessee law provides: "It shall be unlawful for a person, or persons, to display, exhibit, handle, or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person." TENN. CODE ANN. § 39-2208 (1955).

142. Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179 (1949).

143. This philosophy does not always apply to the decisions of parents concerning their children, where failure to provide medical treatment could subject the parent to charges of child neglect or manslaughter in the case of death. However, even in cases involving children, the court has occasionally been lenient. For example, in *Commonwealth v. Sheridan, cited in* L. WEINRELS, CRIMINAL LAW 179-83 (1969), a Christian Scientist was convicted of manslaughter after her five year old daughter died from the complications of pneumonia. The court placed the mother on five years probation. *Id.*

144. CAL. BUS. & PROF. CODE § 2141 (West 1974).

145. *Id.* § 2141.5.

146. *Id.* § 2146.

147. CAL. BUS. & PROF. CODE §§ 2863, 2884 (West 1974).

148. State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973).

2. Japanese Approach

Article 20 of the Japanese Constitution guarantees freedom of religion to Japanese citizens.[149] However, as in the American system, this right is not absolute, as demonstrated by the Supreme Court case of *Nishida v. Japan.*[150] In *Nishida,* a mentally disturbed woman died while under the care of a priestess. The priestess, a member of a bona fide Buddhist sect, followed procedures prescribed by her religion to drive out an evil spirit, in an attempt to cure the woman.[151] The priestess performed the procedure at the request of the woman's family, who had lost faith in her family physician.

A lower court convicted the priestess of inflicting injury resulting in death. The priestess appealed her conviction on the ground that she had had no criminal intent and had inflicted no bodily harm on the deceased. The priestess further argued that the lower court had exhibited a religious bias by calling her sincere religious beliefs and practices, superstitious and ignorant.

The Japanese Supreme Court upheld the lower court's ruling on the basis of Articles 12[152] and 13[153] of the Constitution, which proscribe any infringement on fundamental human rights, as long as the exercise of those rights does not interfere with the public welfare. With regard to Articles 12 and 13, the Court stated:

> Even if . . . the acts of the accused in this case were . . . a kind of religious act, they correspond to unlawful exercise of physical force endangering the life and limb of another person. Accordingly, the acts of the accused undeniably ended in the death of the victim and were seriously inimical to society.[154]

The Court concluded that the acts of the priestess exceeded the boundaries of

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149. MAKI, *supra* note 36, at 414:

> Article 20 of the Japanese Constitution provides: (1) Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority. (2) No person shall be compelled to take part in any religious acts, celebration rite or practice. (3) The state and its organs shall refrain from religious education or any other religious activity. The First Amendment of the United States Constitution reads: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Id.

150. Decision of May 15, 1963, 17 Sai-han Keishū 4 (Grand Bench).

151. The ritual consisted of chanting sutras, burning incense, and rubbing the woman's body with prayer beads. The woman was physically weak and the lack of necessary hospital treatment resulted in her death. *Id.*

152. Article 12 of the Japanese Constitution provides: "The freedoms and rights guaranteed to the people by the Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare." MAKI, *supra* note 36, at 413.

153. For the text of article 13, *see* note 134 *supra.*

154. Decision of May 15, 1963, 17 Sai-han Keishū 4, at 303 (Grand Bench).

the freedom of religion guaranteed in Article 20, and that the punishment of those acts under Article 205 of the Criminal Code[155] did not violate the Constitution.

The *Nishida* holding demonstrates that in Japanese society freedom of religion is not absolute and must be balanced against the general effect of its exercise upon the public welfare. The *Nishida* Court also considered the issue of the regulation of religious-based medical treatment and stated that: "The manner, methods and motives in practicing this faith cure, attended by a degree of violence that ended in the victim's loss of life . . . cannot possibly be recognized as acts of medical treatment for persons with medical disorders generally accepted in medical practice."[156]

3. Comparative Analysis

The result in *Nishida v. Japan* would probably be different if the case were tried under American case law principles. At the least, the priestess would suffer a lesser penalty, because she apparently demonstrated a bona fide religious belief. The trend in the United States has been toward a policy of judicial leniency where the court finds a sincere religious belief. The American approach protects against the danger that the emotional sentiments underlying personal religious beliefs will obscure the legal issues or permit encroachment on constitutional rights. As one American commentator reasoned:

> Those of us who belong to churches which are rich and respectable quite properly condemn the snake handlers, the floggers, the faith healers. But under a constitutional scheme which allows the state no religious favoritism, even these extremist groups must be as free to follow their conscience as the rest of us are.[157]

V. OTHER TOPIC SUGGESTIONS FOR COMPARISON

The curriculum might also discuss the licensing of public gatherings in Japan and the United States. This discussion could include a comparison of *Cox v. New Hampshire*[158] and *Niemotko v. Maryland*,[159] with the Tokyo Ordinance Decision[160]

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155. KEIHO (Penal Code) art. 205. This article provides:

(1) A person, who inflicts an injury upon the person of another and thereby causes the latter's death, shall be punished with penal servitude for a limited period of not less than two years. (2) When the crime is committed against a lineal ascendant of the offender or of the spouse thereof, the offender shall be punished with penal servitude for the life or not less than three years.

156. Decision of May 15, 1963, 17 Sai-han Keishū 4, at 303 (Grand Bench).

157. Wright, Book Review, 38 MINN. L. REV. 87, 89-90 (1953).

158. 312 U.S. 569 (1941).

159. 340 U.S. 268 (1951).

160. For a discussion of the *Tokyo Ordinance* decision, *see* CONSTITUTION OF JAPAN, *supra* note 37, at

to determine American and Japanese constitutional standards for the issuance of licenses for public gatherings. Students will observe that, in the Tokyo Ordinance Decision, the defendants had made no effort to obtain a license, but instead, had attacked the ordinance on its face. After reading *Cox* and *Niemotko* students should then analyze whether an American defendant would succeed in such an attack.

Students might also examine the concept of property rights and due process of law in the United States and Japan through a comparison of the fifth and fourteenth amendments to the United States Constitution and Article 31 of the Japanese Constitution. The omission of the term "property" in the Japanese Constitution will be notable. In order to compare the rights of American citizens to "due process of law," with the rights of Japanese citizens to "procedure established by law," students should read the Customs Law Violation Decision.[161]

In that case, the Japanese Supreme Court held a statutory provision that required an innocent party to forfeit property used in smuggling to be unconstitutional. Students should then consult the text, *Constitutional Law*,[162] to find analogous U.S. decisions. Comparing these cases, the student should analyze how the decisions differ when decided within the broader context of protection of property rights under the due process clause of the United States Constitution.

VI. CONCLUSION

Past and present American involvement with Japan, China, Korea and Vietnam are concerns for the American people. An Asian law seminar contains the potential to heighten American law students' awareness that factors in foreign nations increasingly condition today's legal, as well as social problems. The author designed the seminar described in this article to engage in the challenging task of clarifying the meaning and characteristics of the East Asian legal culture, and of assessing the impact of civil and Anglo-American legal traditions on Asian nations.

The suggested Japanese and American constitutional law cases provide American law students with a unique comparative approach. Although the constitutional guarantees in both the United States and Japan appear to be similar in scope, they are significantly different in application. One cannot explain this difference in terms of the constitutional provisions, themselves, but must focus

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220-38; Nathanson, *Human Rights in Japan Through the Looking-Glass of Supreme Court Decisions*, 11 How. L. J. 316, 319 (1965); Nathanson, *Constitutional Protection of Freedom of Assembly in Japan and the United States*, 12 Int'l & Comp. L. Q. 1032, 1042 (1963).

161. For a discussion of the *Customs Law Violation* case, *see* Constitution of Japan, *supra* note 37, at 248-49.

162. M. Forkosch, Constitutional Law (2d ed. 1969).

instead on the different cultural contexts in which those guarantees function. Japanese culture stresses social interaction and inter-group duties and responsibilities. In the United States, individualism has provided the background for constitutional development and interpretation. Due to the recent proliferation of literature on Asian law,[163] a successful undertaking of a seminar on Asian nations in a law school setting is no longer a difficult venture, but an attainable — and practical — possibility.

163. For a list of some of the relevant literature in this area, *see* note 22 *supra*.